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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-1506

HARLAN #4 COAL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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National Labor Relations Act, as amended
(61 Stat. 136, 73 Stat. 519)
29 U.S.C., Sec. 151 4

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NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harlan #4 Coal Company, Petitioner herin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above- entitled case on January 10, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 490 F.2d 117. The opinion of the National Labor Relations Board is reported at 199 NLRB #15.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1974. The jurisdiction of this Court rests on 28 U. S. C. sec. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects employees in the exercise of their right to determine questions of representation, in an election conducted by the National Labor Relations Board, from being subject to deliberately false information pertinent to a material issue which is calculated to influence dishonestly their voting decision.

STATUTE INVOLVED

Section 1 of the National Labor Relations Act (29 U. S. C. sec. 151) accords employees "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 of the Act restates the same principles with a further statement that employees "shall also have the right to refrain from any or all such activities . . ." To provide a procedure for implementing the rights of employees, Section 9 (c) (1) (B) further provides that "if the Board finds upon the record of such hearing that such a question of representation exists, it

shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

I. The Findings

In May of 1970, a majority of the employees of the Company (petitioner herein) voted against the United Mine Workers of America ("the Union") as their representative. Another election was held on September 23, 1971. The day before this election the employees received from the Union a letter containing a deliberately untrue representation on the critically important wage issue and the Union stationed two of its agents adjacent to the voting area where they could give the voters the impression of surveilance and checking off. A majority of the employees now voted for the Union.

On September 22, 1971, a letter from William J Turnblazer, the union's president, was received by the company employees who were to vote in the NLRB election scheduled for the next day.

Mr. Turnblazer represented the following to the employees.

> "Don't be mis-led (sic) by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the

> United Mineworkers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family."

This letter did not come to the attention of the company until after the election on September 23, 1971. Accordingly, the company had no opportunity to respond to it prior to the election. Subsequent to the election, which the union won by a vote of 43-16, the company filed objections wherein it alleged, *inter alia,* that the above-quoted statement in the union's election-eve letter constituted a material misrepresentation which warrented a reversal of the election result.

II. The Board's Conclusion and Order

In his Supplemental Decision and Certification of Representative, the NLRB Regional Director for Region 9 acknowledged that,

> "The employer could not, during the wage-price freeze, implement increased wage rates and/or related employee benefits, whether or not the employees voted to be represented by the (union) and were to be covered under the National Bituminous Wage Agreement."

The Regional Director concluded therefore that President Turnblazer's letter "could be subject to the

interpretation that if the employees vote for the (union), they would avoid the legal effect of the wage freeze." Nevertheless, the Regional Director declined to set aside the election. He stated that the employees were aware that no wage increases could be obtained unless the employer agreed to them in negotiation with the union and he cited Board cases permitting union campaign promises of wage increases which were dependent upon employer acquiescence at the bargaining table. Additionally, the Regional Director took

> "official notice of the fact that the Federal Government has publicized the wage-price freeze program and publicized telephone numbers which citizens can call concerning questions as to the effect of the wage-price freeze on specific matters.

The Regional Director also declined to place any weight upon eight identical employee affidavits which stated that:

> "I was led to believe that if this union won the election, I would receive at once the present union contract wages and other benefits, although other people's wages were frozen by President Nixon."

> "This letter did influence my vote and I make this statement on my own free will with no threats or promises from anyone."

The Board affirmed the Regional Director, refused to set aside the election, and ordered the company to bargin collectively with the union and perform other acts incidental to the foregoing 199 NLRB #15.

III. The Decision Of The Court Of Appeals

The Court of Appeals denied the petition of the company and granted enforcement of the order of the National Labor Relations Board. The Court admitted that the challenged letter was sent to employees at a time that prevented the company from effectively replying to it. Nevertheless, the Court upheld the decision of the Board on two grounds: first, that the letter was not susceptible only to the interpretation urged by the company, but instead was ambiguous and subject to several interpretations. Second, that information about the wage freeze was not within the "special knowledge" of the union but was, on the contrary, readily available to employees.

REASONS FOR GRANTING THE WRIT

Whether or not the National Labor Relations Act protects employees in the exercise of their rights from being influenced by deliberately false information in an election to determine their choice of a representative is an important and recurrent question which this Court should decide. The Congress has stated that "it is a purpose of The National

Labor Relations Act to prescribe the legitimate rights of both employees and employers in their relations effecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities effect commerce, to define and proscribe practices on the part of labor and management which effect commerce and are inimical to the general welfare. . . ." In short employees may not effectively carry out their rights provided under the Act if they are to be subjected to deliberately contrived false information, pertinent to material issues, which is disseminated to them on the eve of a representation collection.

The NLRB's standards for reviewing election campaign propaganda were set forth in the leading case of *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 223 (1962);

> "The basic policy underlying . . . rules in this election field is to assure the employees full and complete freedom of choice in selecting a bargaining representative. The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees. One of the factors which may so disturb these conditions as to interfere with the expres-

> sion of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisioned by the Act. For this reason, the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted."

The *Hollywood Ceramics* standard has been approved by every circuit court of appeals. *NLRB* v. *A. G. Pollard Co.*, 393 F. 2d 239, 241-43 (1st Cir. 1968); *Bausch & Lomb, Inc.* v. *NLRB*, 1971 CCH Labor Relations Para. 12,150 (2d Cir. 1971); *Carlisle Paper Box Company* v. *NLRB*, 398 F. 2d1, (3d Cir. 1968); *NLRB* v. *Bata Shoe Co.*, 377 F. 2d 821, 828-29 (4th Cir.) *cert. denied*, 389 U.S. 917 (1967); *S. H. Kress & Co.* v. *NLRB*, 430 F. 2d 1234, 1239 (5th Cir. 1970); *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967); *Follett Corp* v. *NLRB*, 397 F. 2d 91, 95 (7th Cir. 1968); *NLRB* v. *Lord Baltimore Press, Inc.*, 370 F. 2d 397, 401-02 (8th Cir. 1966); *Gallenkamp Stores Co.* v.

NLRB, 402 F. 2d 525, 533-35 (9th Cir. 1968); *NLRB* v. *Gold Spot Dairy, Inc.*, 432 F. 2d 125, 129 (10th Cir. 1970); *IBEW* v. *NLRB*, 417 F. 2d 1144, 1146-47 (D.C. Cir.), *cert. denied*, 396 U.S. 1004 (1969).

As the Regional Director acknowledged, there is no question in the instant case of the existance of a misrepresentation. There is also no dispute that a misrepresentation was made "so shortly before the election that the other party or parties (did) not have time to correct it". Rather, the Regional Director seems to have held either that the misrepresentation was not "material", or that it was not likely to have had a substantial effect on the election.*

Insofar as the Regional Director's ruling is based on lack of materiality or on the presumption that the employees had sufficient knowledge concerning the legal restrictions on their wages resulting from the wage-price freeze program, there is substantial NLRB precedent to the contrary. In *Continental Oil Co.*,

> "But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the cir-

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* The Regional Director seems to have relied on the following additional language in *Hollywood Ceramics* (140 NLRB at 244):

> cumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion, Or, the Board may find that the employees possessed independent knowledge with which to eveluate the statements."

58 NLRB 169 (1944), the War Labor Board, which was responsible for stabilizing wages during World War II, informed the employer that it had approved a contract negotiated with the incumbent union prior to the filing of an election petition by an insurgent union, This information was communicated to the employees shortly before the election. In announcing its approval of the contract prior to the representation election, the War Labor Board violated its own labor regulations since approval should have been withheld pending the outcome of the election. Upon objections made by the insurgent union, the NLRB set aside the election. The NLRB stressed the difficulty in assessing the impact which this information would have upon the employees but indi-

cated its view that during a period when a stabilization program limited permissible increases, the communicating of misinformation concerning the permissibility of increases pursuant to such a program was bound to have great impact on the employees. The Board stated (58 NLRB at 172):

> "It is virtually impossible to ascertain the full effects upon the employees' free exercise of the right to select a collective bargaining representative of the War Labor Board's announcement just prior to the runoff election that it had approved the wage increase. In the present period of fixed wage ceilings, with resultant limitations imposed upon one of the most effective appeals which a labor organization can make to employees during an organiza tion campaign, namely, the promise of better wages, we conclude that the announcement of the Independent and the Company, prevented a free choice by the employees."

Accord, Seneca Knitting Mills, Inc., 59 NLRB 745, 756 (1944).

A similar situation arose in *Radio Corporation of America* 102 NLRB 124 (1954). Subsequent to the filing or an election petition by an insur-

gent union, the employer and the incumbent union negotiated an agreement which, pursuant to the then existing wage stabilization program, had to be submitted for approval of the Wage Stabilization Board. On the day prior to the election, the incumbent union informed the employees that the contract had been approved by the Wage Stabilization Board. This information had been obtained by the employer from the Stabilization Board's Regional Office. Later that same day, however, officials of the Wage Stabilization Board retracted the approval as inconsistent with its practice of not approving contracts where an election proceeding was pending befor the NLRB. Neither the employer nor the incumbent union made any effort to communicate the retraction to the employees. Once again, the NLRB set aside the election. The Board stated (102 NLRB at 126-27):

> "Clearly the precipitate announcement and the failure to take steps to clarify the actual status of the raise approval resulted in the election not being conducted in an atmosphere of free choice by the employees. Whatever the right to rebut election propaganda may be, it does not include the right to create a false impression that concrete benefits to employees have been secured, when, in fact, no such assurance can be given before the election takes place. . . . We think the conduct of

> the Employer and Intervenor was calculated to and did affect the results of the election.

These cases have application to the misrepresentation in President Turnblazer's letter. They constitute an acknowledgement by the NLRB of the likelihood that election results will be unduly affected by representations concerning the premissibility of certain wage increases under a wage stabilization program.* As the Board stated in *Continental Oil Co., supra,* a wage stabilization program limits employee wages and conesquently also limits the extent to which unions can employ the promise of better wages in their campaign propaganda. In the above-cited cases, the employees were in effect told that a vote for the incumbent union would insure previously negotiated wage increases notwithstanding the stabilization program and that, by contrast, a vote for the insurgent union would nullify the approved contract and perhaps cause the employees to lose the approved increase. Since the stabilization agencies were precluded from approving these contracts the information conveyed to the employees was misleading, and as the Board recognized, this information unduly affected the votes which they cast.

In the instant case, the employees were similarly misled. As in the earlier cases, the union incorrectly led the employees to believe that a vote for

the union would permit wage increases otherwise precluded by Phase 1 of the present Economic Stabilization Program.

Furthermore, as the above-cited NLRB cases show, employees cannot be expected to be in a position to evaluate the legal ramifications of a wage stabilization program. In *Continental Oil* and the cases following it, the NLRB was unwilling to assume that employees knew that contract approvals by the stabilization agencies were in violation of their own regulations. By analogy, the Regional Director erred in assuming that the employees' knowledge of the present Wage Stabilization Program was sufficiently sophisticated to warrent the conclusion that they would, as a matter of course, discount the claim that joining the union would make union contract rates available to them, notwithstanding the Phase 1 freeze.

In *Wilson Athletic Goods Mfg. Co.*, 73NLRB 744 (1947), *affirmed*, 164 F. 2d 637 (1947), the employer refused to bargain, notwithstanding the NLRB's certification of the unions subsequent to an NLRB election, because the union had promised employees that it would obtain a 30¢ hourly increase in wages if they won the NLRB election. The NLRB rejected the employer's defense to the refusal to bargain charge which was premised on

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* Indeed, the stabilization agencies' own rules precluding approval of a contract during the pendency of an NLRB election proceeding constituted an explicit recognition of this principle.

the concluded fact that the hourly increase which the union had referred to disregarded lawful wage patterns established by the Wage Stabilization Board. The NLRB, affirmed by Court of Appeals for the Seventh Circuit, stated (73 NLRB at 745):

> "The Union's so-called promise of a 30-cent wage increase, even though such an increase might have been in excess of the then existing wage stabilization rates, constituted, at most, campaign propaganda which did not tend to impair the employees' freedom to select a bargaining representative. Moreover, as the Board stated in the *Maywood Hosiery* case 'Absent violence, we have never undertaken to police union organiza tion or union campaigns, to weight the truth or falsehood of official union utterances, or to curb the enthusiastic efforts of employee adherents to the union cause in winning others to their convictions'."

Several comments concerning the *Wilson* decision are in order. First, the far-reaching language used by the NLRB concerning its reluctance to police election campaigns and to weigh the truth or falsehood of union utterances is inconsistent with the more recent standards laid down by the Board and approved by the Courts in the *Hollywood Ceramics* case. It is doubtful that the Board would use such language today and it is clear that the

courts would not approve it. See the cases cited, *supra*, p.4, note *.

Secondly, the above-quoted holding was unnecessary to the decision of the case and hence is properly viewed as mere *dicta*. As the NLRB itself noted, the employer in the *Wilson* case did not object to the promise of a 30¢ hourly increase prior to the certification of the union as the bargaining representative. Hence, under the NLRB's rules, the employer was precluded from raising the question in the subsequent unfair labor practice proceeding. See 73 NLRB at 745, note 3. Third, as both the NLRB and the Seventh Circuit noted, the campaign literature which the employer objected to did not contain an unqualified assertion that a 30¢ per hour increase could be negotiated. Rather, the union in the *Wilson* case merely asserted that it would do its best to obtain such an increase. Finally, the challenged campaign propaganda in the *Wilson* case did not involve any directed assertions concerning the wage stabilization program then in effect. Unlike the instant situation, there was no direct claim that a vote for the union would provide a means of obtaining wages otherwise precluded by the stabilization program.

In sum, the *Wilson* case is distinguishable from the instant case and constitutes a precedent which the NLRB and the courts might well be reluctant to follow today. The disruption of the electoral process in *Continental Oil*, *Seneca Knitting*

Mills and *RCA, supra,* more nearly resembles the confusion created in employees' minds in the present situation. Those cases stand for the proposition that employees free choice is substantially affected by creating the erroneous impression that a vote for the union is a means of obtaining wage increases otherwise prohibited by a wage stabilization program. The Court of Appeals for the Sixth Circuit and the other circuit courts have shown themeslves to be willing to reverse NLRB conclusions concerning permissible campaign propaganda, especially where the misrepresentations are deliberate and are communicated to the employees on the eve of the election.

While the Court of Appeals for the Sixth Circuit has affirmed the NLRB's expertise in appraising election propaganda, *NLRB* v. *Allen Mfg. Co.*, 364 F. 2d 814 (6th Cir. 1966), it has also exhibited a willingness on other occasions to review those NLRB appraisals with a critical eye. The Court has stated that while the Board's judgments "are "entitled to great respect, evolved from wide experience, it is not infallible." *Cross Co.* v. *NLRB,* 286 F. 2d 799, 801 (6th Cir. 1961), *rehearing denied,* 288 F. 2d 188. In *Cross Co.*, the Court quoted from Justice Frankfurters' opinion in *Universal Camera Corp* v. *NLRB,* 340 U. S. 474 (1951), and concluded (286 F. 2d at 803):

> "The *Universal Camera* case, *supra, rec*ognizes that not all the Courts of Appeals

have accorded finality to the Board's decisions, an *where there has been recognizable falsity in election campaign statements, at a time when they were impossible of correction*, the Seventh and District of Columbia Circuit Courts of Appeals have not departed from more conventional standards. *Allis Chalmers Mfg. Co.*, v. *N.L.R.B.*, 7 Cir., 261 F. 2d 613; *Cleanse Corp. of America* v. *N.L.R.B.*, 7 Cir., 279 F. 2d 204; and *International Union of Electrical Radio and Machine Workers AFL-CIO* v. *N.L.R.B.*, D. C. Cir./__ F. 2d ____, and the Labor Board itself recognizes that there are limits to the Board's discretion. *Gummed Products Co.*, 112 N.L.R.B. 1092." (Emphasis supplied*

"A word about standards. We do not accept the Board's proposition that reversal of an electiton requires proof of 'arbitrary and capricious" action . . . The act provides that the employees shall have representatives of 'their own choosing.' 29 U.S.C. S 157. We do not think that the Board's view of what impairs freedom of choice is any more sacrosanct than its other fact-finding powers."

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* Accord: *NLRB* v. *Tranchoa Chemical Corp.*, 303 F. 2d 456, 461 (1st Cir. 1962), where the court stated:

Following these cases, the Sixth Circuit rejected the NLRB's conclusion that misrepresentations contained in handbills distributed by the union on the morning of the election had an insubstantial effect on the outcome of that election. The court criticized the NLRB for not giving any weight to affidavits executed by employees who claimed that their votes were affected by the misrepresentations contained in the handbills (286 F. 2d at 801) and the Court concluded that it was

> "unable to follow the arguments of the Board that the misrepresentations of the union were fair, that they were mere propaganda, half truths and legitimate campaign representations. There should have been another election not subject to the infirmities here disclosed."

The court was equally adamant in rejecting the NLRB's petition for rehearing, stating (288 F 2d at 189):

> "There was no denial that the misstatements were made, no denial that they were false and the defense of them as legitimate election propaganda by the barganing agent at the time they were made establishes their importance as a contributing factor in determining the outcome of the election. In political elec-

> tions, this is called a 'roorback'. It is obvious that the purpose of the falsity was to unfairly control the result of the election."

The cases in the Sixth and other circuits involving review of NLRB findings concerning pre-election union misrepresentations stress two factors—whether the misrepresentations were deliberately false and whether the employer had an opportunity to rebut the misrepresentations. In *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967), the Court distinguished *Cross Co. supra*, on the ground that the misrepresentation challenged by the employer

> "was not disseminated at a time or in a manner calculated to deprive the (employer) of an opportunity to reply."*

Other recent court cases stressing the opportunity, or lack thereof, to rebut misrepresentations as an important factor include *NLRB* v. *Bata Shoe Co.*, 377 F. 2d 821 (4th Cir. 1967); *Tyler Pipe Industries, Inc.* v. NLRB, 406 F. 2d 1272 (5th Cir. 1969), opinion reversing NLRB's decision on remand, 447 F. 2d 1136 (1971) (per Judge O'Sullivan sitting by designation): *NLRB* v. *Southern Foods, Inc.*, 434 F. 2d 717 (5th Cir. 1970); *Bausch & Lomb, Inc.* v. NLRB, 4 CCH Lab. Cas. 1971,|| 12,150 at p. 22,587 (2d Cir.), decided October 22, 1971.

There are also several cases in which the courts have disagreed with the NLRB's conclusion concerning the likely impact of union misrepresentations upon the employees where the misrepresentations were deliberate. As previously noted, the Sixth

> "Having deliberately by-passed its opportunity to reply the (employer) cannot now contend that the union campaign material, which was refutable, prevented the exercise of a free choice by its employees in the election of their bargaining representative." 385 F.2d at 927.

Circuit referred to this factor in denying the NLRB's petition for rehearing in *Cross Co., supra.* In addition, in *NLRB* v. *Gorbea, Perez & Morell,* 328 F.2d 679, 682 (1st Cir. 1964), the court stated:

> "We think the better expert on what persuasion is needed by persons sought to be induced is the knowledgeable party who offers consciously false inducements."

Accord: NLRB v. *Marine Sugar Industries, Inc,* 425 F. 2d 942 (1st Cir. 1970); *Bausch & Lomb, Inc.* v. *NLRB, supra; Tyler Pipe Industries, Inc.* v. *NLRB, supra.*

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* The Court's opinion reveals that the challenged misrepresentation was made approximately two weeks prior to the election and the court ruled:

In *Cross Baking Co.* v. *NLRB*, *453* F.2d *1346*, 78 LRRM 3059 (1st Cir.), decided December 2, 1971, the Court set aside an election where the union made deliberate election-eve misrepresentations. The Court used the following language (78 LRRM at 3061):

> "Eleventh hour misrepresentations, manifestly deliberately untrue, have obviously been carefully timed to obtain the utmost benefit of the untruth, and presumably have been phrased to go just far enough to meet what the misrepresenting party believes to be necessary. We suggest that there should be an affirmative burden upon that party, accordingly, to disprove materiality."

In *NLRB* v. *Millard Metal Service Center, Inc.*, 82 LRRM 2345 (1st Cir. 1973) the Court again reaffirmed its holding that elections must be set aside when the Union circulates deliberate falsehoods just before the election occurs. In *Walled Lake Door Company* v. *NLRB*, 472F.2nd 1010, 82 LRRM 2499 (5th Cir. 1973) the Court also overruled the NLRB and held that an election and a resulting certification were invalid where the Union sent a campaign letter with a clear misstatement of fact immediately prior to the election.

In the instant situation, the claim that a vote for the Union would permit an increase during the freeze

to the level of wages provided for in the Union's contract was so palpably contrary to the rulings of the Cost of Living Council and the Office of Emergency Preparedness that the claim must be considered to have been deliberately false. Moreover, it was couched in terms which made it more likely to have a substantial impact on the employees since they were urged to "think about this for the benefit of yourselves and your family". Finally, the misrepresentation was advanced for the first time on the eve of the election when the company had no opportunity to offer a rebuttal.

The petition should be granted.

Respectfully Submitted,

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Attorneys

Harlan #4 Coal Company

April, 1974

No. 72-1997

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARLAN COAL COMPANY, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	ON PETITION for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board.

Decided and Filed January 10, 1974.

Before: WEICK, EDWARDS and MCCREE, Circuit Judges.

MCCREE, Circuit Judge. This petition for review of on order of the National Labor Relations Board by the Harlan #4 Coal Company and the cross-application for its enforcement by the Board require us to determine whether there is substantial evidence on the record as a whole to support the Board's determination that the company's refusal to bargain with its employees' certified bargaining agent was an unfair labor practice in violation of sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a),(5)(1). We hold that there is.

The events culminating in this appeal began over three years ago on May 28, 1970, when a majority of the employees of the Harlan #4 Coal Company (the company) voted against having the United Mine Workers of America

(the union) act as their exclusive bargaining representative. The union filed with the National Labor Relations Board timely objections to the election alleging that the company's improper conduct during the election campaign invalidated the result. On February 23, 1971, a hearing officer founded that the company had engaged in improper conduct and recommended that the election be set aside. This determination was affirmed by the Board's Regional Director and a second election was directed. The company's request for review by the Board was denied because there were no substantial issues warranting review.

On May 5, 1971, the company filed a motion requesting that a new bargaining unit or different bargaining units be determined in light of changed conditions and circumstances including the closing of one mine and the opening of another. The Regional Director stayed the second election and ordered a hearing to determine the appropriate bargaining unit. On August 5, 1971, the Regional Director issued an order in which he redefined the appropriate bargaining unit to include all production and maintenance employees working in or around the coal mines of the company and at its K.O.K. No. 1, K.O.K. No. 2 and K.O.K. No. 3 division mines. The company did not file a request for review of this redefinition of the unit prior to the second election.

On September 23 1971, a majority of the company's employees voted for the union. Shortly thereafter, the company filed four objections to the election contending that: (1) union representatives stationed themselves adjacent to the voting area and gave company employees the impression of surveillance and "checking off": (2) on the eve of the election the union president sent to company employees a letter containing a material misrepresentation to which the company had no opportunity to respond;

(3) the union disseminated false information that the company had coerced and intimidated its employees; and (4) the provision on the election ballot for a "neither" vote to be checked if an employee wanted neither of the two unions participating in the election to represent him was misleading.

The Regional Director, in a supplemental Decision and Certification of Representation determined that the company's objections were without merit and, on November 15, 1971, certified the United Mine Workers as the exclusive bargaining agent of the company's employees. The company's request for review of the certification by the Board was denied on February 2, 1972, because it failed to raise substantial questions warranting review.

Meanwhile, on November 29, 1971, the union had requested the company to bargain. On December 10, the company's president informed the union that a request for review of the Regional Director's decision was pending and that the union should call back after the disposition of that request. On December 14, 1971, and again on February 4, 1972, two days after the Board had refused the requested review, the union requested the company to bargain. These requests were refused.

On February 22, 1972, the union filed with the Board an unfair labor practice charge that the company had refused to bargain with it even though it had been properly certified as the exclusive bargaining agent. On March 29, the General Counsel to the Board issued a complaint and notice of hearing against the company. On April 6, the company answered that it had not refused to bargain and that the election had been conducted in an inappropriate unit. On June 8, the General Counsel filed with the Board a motion for summary judgment against the company.

Five days later, the Board issued an order transferring the proceedings to it, and a notice to show cause why the motion should not be granted. On June 23, the company filed a memorandum in opposition to the General Counsel's motion. The Board held that the issues raised by the company in opposition to the motion either had been or could have been litigated in the prior representation proceeding and therefore could not be relitigated in the unfair labor practice proceeding in the absence of newly discovered or previously unavailable evidence. Accordingly, it granted the motion for summary judgment. In its Decision and Order issued on September 18, 1972, 199 NLRB No. 15, the Board found that the company's refusal to bargain with the union violated sections 8(a)(5) and (1) of the National Labor Relations Act, reaffirmed the certification of the United Mine Workers, and required the company to bargain with it upon request and to post appropriate notices.

In this appeal from that order, the company argues that its refusal to bargain did not constitute an unfair labor practice because the election of September 23, 1971, should have been set aside for two reasons. First, the Regional Director should have held a hearing to determine whether union representatives improperly surveilled and checked off company employees. Second, the letter sent by the union president to company employees on the eve of the election contained a material misrepresentation to which the company had no opportunity to respond thereby destroying the "laboratory conditions" necessary to a valid election.

In reviewing the decision of the Labor Board, we observe that Congress has entrusted to the Board considerable latitude in resolving disputes concerning representation, and that our task is to determine whether the Board

has acted arbitrarily in the exercise of its "wide degree of discretion." *E.g., NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 180 (6th Cir. 1967) *cert. denied*, 389 U.S. 958. We also observe that a party objecting to the validity of an election on the grounds of improper pre-election conduct must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair. *E.g., NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *NLRB* v. *Dean Foods Co.*, 421 F.2d 664, (6th Cir. 1970) *cert. denied*, 398 U.S. 939.

UNION SURVEILLANCE

In support of its objection that the union engaged in improper surveillance of its employees, the company submitted only a single affidavit by its treasurer, Ralph Fortner, who stated:

> As I left the voting place just before 8 o'clock, I noticed that Philpot and Hall, Petitioner representatives, went to an automobile which was parked about 20 feet from where the employees were lining up to vote.. The headlights of that car pointed in the direction of the employees. The Petitioner representatives seated themselves inside the car in the front seat and were looking through the front windshield at the employees . I proceeded away from the area with other Employer representatives and walked down a railroad track about 400 to 500 feet. I was concerned as to whether the Petitioner representatives had left the voting area. I climbed up on a coal car and looked back and saw that the Petitioner representatives were still in the auto where I had previously seen them. This was at approximately 8:10 to 8:15 a.m. From the angle I was looking I

> could not see any of the voters and they could not see me. I believe by this time most of the employees at the mine had voted. The relationship of the Petitioner representatives to the line of voters was such as to give the clear impression that they had the voting line under surveillance and were checking off voters.

In response, union representatives who were near the polling place submitted affidavits in which they denied any improper conduct and disputed the allegations contained in the company affidavit:

> Immediately prior to the opening of the polls we left the voting area and proceeded about 700 yards from the polling place and parked the car in which we were riding. We did not talk to anyone that voted during the period of time the polls were open and didn't recall that anyone that voted in the election passed our car. The men that voted were practically all at the polls when the polls opened.

The Regional Director declined to hold a hearing to determine whether the union had engaged in improper surveillance. In so doing he relied upon the Board's decision in *A. D. Julliard and Co.*, 110 N.L.R.B. 2197, 2199; *Belk's Department Store of Savannah, Ga., Inc.*, 98 N.L.R.B. 280, 281; and *International Stamping Co., Inc.*, 97 N.L.R.B. 921, 922, where the Board stated:

> Although it is the policy of the Board to prohibit the keeping of any list, apart from the official voting list, of persons who have voted in a Board-directed election in the cases in which this prohibition was enunciated, it was either affirmatively shown or could be inferred from the circumstances, that the em-

ployees knew that their names were being recorded by the Employer. In the instant proceeding, there is no such affirmative evidence; nor may any such be inferred from the circumstances in the case.

Observing that the party alleging the objectionable conduct has the duty to furnish evidence that affords a basis for setting aside an election, *Felix Bonura Company*, 119 N.L.R.B. 1620, and noting the absence of employee complaints of surveillance, the Regional Director found that the company had not adduced any evidence from which he could infer that union representatives either maintained a list of employees or that if such a list had been maintained that employees believed that their names were being recorded at the polling place.

We agree that the company's affidavit supported a finding only that union representatives were at the polling place. Presence alone, in the absence of evidence of coercion or other objectionable conduct, is sufficient to warrant setting aside an election. *Choctaw Privision Company, Inc.*, 122 N.L.R.B .474; *Cooper Supply Company*, 120 N.L.R.B. 1023; *Houston Shell and Concrete Division, McDonough Company*, 118 N.L.R.B. 1511. And since the company's affidavit, if accepted as true, would not require setting aside the election, no evidentiary hearing was necessary. *E.g., NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249, 250 (5th Cir. 1964); *cf. NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division, supra.*

THE MATERIAL MISREPRESENTATION

The alleged material misrepresentation was contained in a letter sent by the United Mine Workers president to

company employees on the eve of the election. This letter stated in relevant part:

> Since the last election the company has been sold to U.S. Plywood-Champion Paper, Inc. This [is] one of the largest corporations in the world, and can easily pay the union scale. It is reported that they paid five million dollars to Bill Conley and his associates, including Frank Qualls. Don't be mis-led[sic] by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the United Mine Workers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family.

The company argues on this appeal that this letter deliberately misrepresented that if employees voted for the union they would receive automatically union wages even though other persons' wages were frozen by order of the President. In support of its argument, the company submitted to the Regional Director eight identical employee affidavits which state in relevant part:

> I was led to belive that if this union won the election, I would receive at once the present union contract wages and other benefits, although other people's wages were frozen by President Nixon. This letter did influence my vote and I make this statement on my own free will with no threats or promises from anyone.

In his decision, the Regional Director refused to accord any weight to these affidavits. Moreover, although he found that letter "could be subject to the interpretation that if the employees vote for the petitioner, they

would avoid the legal effect of the wage freeze," he refused to set aside the election on this ground. First, he explained, the employees were aware that no wage increase could be obtained unless the company agreed to it in negotiation with the union and the company had indicated to its employees several times that it would not agree to increased wages. Second, he took "official notice of the fact that the Federal Government has widely publicized the Wage and Price Freeze Program and publicized telephone numbers which citizens can call concerning questions as to the effect of the Wage Price Freeze on specific matters."

Both the failure of the Regional Director to give any weight to the eight identical employee affidavits executed after the election and his decision that the union letter did not constitute a material misrepresentation sufficient to warrant setting aside the election are urged as error before us.

We hold however, that the Regional Director did not err in refusing to give weight to the eight identical employee affidavits and in finding that the letter did not constitute a material misrepresentation so as to warrant setting aside the election. In making this determination, we are mindful of the dangers of permitting otherwise valid elections conducted by secret ballot to be set aside because some voters, after post-election introspection and in response to inquiry by their employers, believe that their votes may have been improperly influenced or because we believe that campaign speeches may have had an impermissible impact on employee free choice.

Our disinclination to find that the Regional Director erred in not permitting statements of voter intention to impeach the validity of secret ballots is consistent with

the holding in *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). *But cf NLRB* v. *Donnelly Garmet Co.*, 330 U. S. 219 (1947). In *Gissel* the Court, in considering whether the validity of union authorization cards could be impeached by testimony of the card signers about subjective intent for signing the cards, accepted.

> the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8 (a), (1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry. *Id* at 608.

If union authorization cards, often signed in the presence of a union solicitor, may not be impeached by testimony concerning an employee's subjective motivation there is less reason to permit this evidence to impeach the more reliable evidence of an employee's intent — his secret ballot. Indeed, in *Gissel*, the Supreme Court "acknowledged the superiority of the election process" in referring to the Labor Board's policy "that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support." *Id.* at 602.

Attempts to permit the introductiton of such evidence have been spurned by courts before. In *NLRB* v. *Clearfield Cheese Co.*, 322 F. 2d 89 (3rd Cir. 1963), for example, the court enforced a bargaining order of the Labor Board based upon findings that a speech and a letter from the employer to his employees conveying a threat that the employer would go out of business if the union

prevailed in the election had robbed the employees of free choice. In finding that it was not permissible to allow employees to testify that their vote against the union had not been the result of employer coercion, the court explained:

> Nor do we think that the Company's offer of proof in any particular demonstrates an area for factual inquiry demanding a formal hearing, or even that such a hearing if had, would bear fruitful results. Indeed, the preferred testimony of some employees (who presumably would testify favorably for the Company) as to their understanding of the speech and letter does not begin to reach the substance of the matter. But such testimony would invite the further inquiry, in this instance, as to the direction of the witness-employees' thoughts on representation by the Union, or how he cast his vote: an inquiry destructive of the purpose of the secret ballot and creative of the spectre of post-election change of mind. *Id.* at 93-94.

Our approval of the Board's determination not to consider employee affidavits does not, however, preclude inquiry into whether the union's letter constituted a material misrepresentation in violation of the rule established by the Board in *Hollywood Ceramics*, 140 N.L.R.B. 221 and adopted by this court in *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922 (6th Cir. 1967) *cert. denied* 390 U. S. (1968). In *Hollywood Ceramics*, where the Board sustained an employer's objection to an election because the union had on the eve of the election, distributed misleading comparisons of wages and requisite skills in the employer's plant and in unionized plants, the Board articulated the following rules for determining when misrepresentation is sufficient to set aside an election:

It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. For this reason, *The Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted.*

We believe that an election should be set aside only when there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations, will not suffice to establish such misrepresentations as would lead us to set the election aside. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, . . . the Board may find that the employees possessed independent knowledge with which to evaluate the statements 140 N.L.R.B. at 224.

In this case, there is no question that the challenged letter sent to the employees at a time that prevented the

company from effectively replying to it. We believe, however, that the Board's finding that the campany's attack failed on the other grounds necessary for setting aside an election is supported by substantial evidence considering the record as a whole. First, the letter was not susceptible only to the interpretation urged by the company but instead was ambiguous and subject to several interpretations. Therefore it was insufficient to serve as a basis for setting aside the election. *Hollywood Ceramics, supra.* Second, Information about the wage freeze was not within the "special knowledge" of the union but was, on the contrary, readily available to employees.

We agree with the Regional Director that the letter is subject to the interpretation that if company employees voted for the union they would immediately obtain union scale wages. However, the letter is equally subject to the interpretation that the union could obtain for employees contract wages as soon as it was legal to do so — as soon as the freeze was ended. The letter is at worst delphic and inartistic. It may have been intended to persuade employees that a temporary wage freeze should not dissuade them from voting for the union.

Even if the letter is interpreted as the company would have us do, the Board did not err in concluding that the misrepresentation is conveyed did not have a real impact on the election. Information about the wage freeze was not within the special knowledge of the union. It had been widely publicized and debated. And, the federal government had established places where answers to specific questions about the freeze could be obtained. Moreover, the Regional Director found, and his finding is not unsupported, that the employees were aware that any increase in wages would have to be agreed upon by

the company and that the company had stated several times that it would not agree to an increase. For all these reasons, the findings of the Board have evidentiary support and should not be set aside.

This case is not controlled by *Seneca Knitting Mills*, 59 N.L.R.B. 754 (1944), *Radio Corporation of America*, 102 N.L.R.B. 124 (1953), and *Continental Oil Co.*, 58 N.L.R.B. 169 (1944), upon which the company relies. Each of those cases involved an election in which an insurgent union was seeking to unseat an incumbent union and just prior to the election either the company or the incumbent union announced that a contract previously negotiated them had been approved by the Wage Stabilization Board, an agency authorized to regulate wage increases. These announcements were made by the Board to either the company or the incumbent union in violation of its own rules prohibiting such announcements during the pendency of a representation election. The Board found that this information, to which employees did not have ready access, would have the obvious effect of making employees believe that a vote for the incumbent union would insure the previously negotiated wage increases and that a vote for the insurgent union would nullify the approved contract and perhaps cause employees to lose the approved wage increase altogether.

Nor is this case similar to *Cross Baking Co.* v. *NLRB*, 453 F.2d 1346 (1st Cir. 1971), where the court set aside, the Board's order to bargain because two days prior to the election, the union sent a letter to the employees that contained the misrepresentation that in another plant the union had obtained and the employees had received a wage increase of seventy-five cents per hour when in fact part of the increase had been obtained by another union and the

employees had not yet received the entire increase. In that case, the information was within the special knowledge of the union, and the employer had no opportunity to respond to the letter. We also observe parenthetically that the union won the election in that case by one vote.

CONCLUSION

This case requires us to determine whether on the record as a whole there is substantial evidence to support the Board's determination that the union did not improperly surveil employees and that the letter sent by the union to employees was not a material misrepresentation that would require the election to be set aside. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951); *Cross Co.* v. *NLRB*, 286 F.2d 799, 802, *rehearing denied*, 288 F.2d 188 (6th Cir. 1961). We observe that this standard of review was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U.S. at 488.

Our examination of the entire record discloses that there is no factual dispute that union representatives, although present during polling, did not engage in any other conduct that would be improper and that there is no dispute concerning the content of the letter sent by the union president to employees and the timing of its delivery. The

inferences to be drawn from these facts, and the widespread publicity accompanying the announcement and implementation of the wage freeze, the knowledge of the employees that no wage increase could be obtained without company agreement, and the company's statements that it would not agree to an increase, are those peculiarly within the Labor Board's expertise. We therefore defer to it.

Review is denied and enforcement is granted.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARLAN NO. 4 COAL COMPANY
Case 9-CA-6829
AND
UNITED MINE WORKERS OF AMERICA

DECISION AND ORDER

Upon a charge filed on February 22, 1972, by the United Mine Workers of America, herein called the Union, and duly served on Harlan #4 Coal Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on March 29, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 15, 1972, representative of Respondent's employees in the unit was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unia found appropriate; and that commencing on or about November 30, 1971, and more particularly by a written letter to the Union on or about December 10, 1971, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has required and is requesting it to do so. On

April 6, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations of the complaint.

On June 8, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 13, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed, as a response to Notice To Show Cause, a Motion in Opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition in response to the General Counsel's Motion for Summary Judgment, Respondent contends, in effect, that the unit is inappropriate, that the Regional Director erroneously overruled its objections in the representation case and improperly and unlawfully certified the Union. The General Counsel contends that since the Respondent is attempting to relitigate issues which were or could have been litigated and decided in the representation proceeding, and which therefore may not be relitigated here, he is entitled to Summary Judgment as a matter of law. We agree.

The record in Case 9-RC-8432 reflects that, pursuant to the Regional Director's Decision and Direction of Election, an election was conducted on May 28, 1970, among the production and maintenance employees working at and around the Respondent's coal mines and those of its K.O.K. Coal Company division. The Union failed to receive a majority and, thereafter, filed timely objections. The Regional Director, on October 7, 1970, issued his Supplemental Decision, Order Directing Hearing, and Notice of Hearing, overruling the Union's Objections 2 and 3 and ordering a hearing with respect to Objection 1, which, in substance, alleged that the Respondent intimidated and coerced its employees with threats of plant closure and with statements that the Union would cause, and had forced, small mines to go out of business. After a hearing, the Hearing Officer, on February 23, 1971, issued his Report on Objections to Election in which he recommended that the election of May 28, 1970, be set aside. Thereafter, Respondent timely filed with the Regional Director exceptions to the Hearing Officer's Report.

In his Second Supplemental Decision, Order and Direction of Second Election of March 12, 1971, the Regional Director affirmed the Hearing Officer's rulings and directed a second election. Thereafter, the Respondent filed a Request for Review which the Board, in a telegraphic response, dated April 20, 1971, denied as it raised no substantial issues warranting review.

On May 5, 1971, the Respondent filed a motion to amend the Regional Director's Second Supplemental Decision, requesting him (a) to determine a new unit or different collective-bargaining units in the light of changed conditions and circumstances, including the clos-

ing of one coal mine and the opening of another, called K.O.K. Company Coal Mine No. 2 and (b) to direct a new date for the Respondent to provide a list of names and addresses of employees eligible to vote. Thereafter, on June 22, 1971, the Regional Director stayed the second election and directed a hearing on the substantial and material issues raised by the Respondent's motion with respect to the appropriate bargaining unit and employee eligibility at the new mine.

After a consolidated hearing, the Regional Director, on August 5, 1971, issued his Decision, Order and Amended Direction of Second Election in which, *inter alia*, the Southern Labor Union was permitted to intervene and have its name placed on the ballot in the second election directed in Case 9-RC-8432, and the appropriate unit was amended to describe specifically the three K.O.K. mines.

In the election conducted on September 23, 1971, the Union received a majority of the votes cast. The Respondent, thereafter, filed timely objections to the election alleging, in substance, that (1) the Union gave the impression of surveillance of the voters, (2) the Union made material misrepresentations concerning the wage freeze, (3) the Union disseminated false information that the Respondent had coerced and intimidated its employees, and (4) the ballot's provision for a "neither" vote was misleading. In his Supplemental Decision and Certification of Representative of November 15, 1971, the Regional Director determined that the objections raised no substantial or material issues requiring the election to be set aside and certified the union as the exclusive bargaining representative of the employees in the appropriate unit.

A timely Request for Review of the Regional Director's action was filed by the Respondent alleging, in substance, that he erred in overruling the objections and in his unit determination. The Board, in a telegraphic response dated February 2, 1972, denied the request as it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8 (a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Tennessee corporation with its principal offices and place of business located at or near Alva, Kentucky, where it is engaged in coal mining operations. During the past 12 months, which is a representative period, Respondent sold and shipped coal valued

in excess of $50,000 in interstate commerce, directly from its coal mining operations in Kentucky to points outside the State of Kentucky.

We find, on the basis of the foregoing, that Respondent, is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

United Mine Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9 (b) of the Act:

All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K. No. 1, K.O.K. No. 2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On September 23, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their repre-

sentative for the purpose of collective bargianing with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on November 15, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9 (a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Concerning on or about November 29, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 10, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since December 10, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that , by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce

among the several States and tend to lead to labor disputes burdening and abstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as begining on the date Respondent commerce to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226,229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 397 U. S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Harlan #4 Coal Company is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.

3. All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K. No. 1, K.O.K. No.2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since November 15, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing on or obout December 10, 1971 and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Harlan #4 Coal Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Mine Workers of America as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K No 1, No. 2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business and coal mines and division coal mines located in and around Alva, Ken-

tucky, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., Sept. 18, 1972.

John H. Flanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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No. 73-1506

In the Supreme Court of the United States

OCTOBER TERM, 1973

HARLAN #4 COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. On September 23, 1971, a Board-conducted representation election [1] was held at three of the Company's mines which resulted in 43 votes for the United Mine Workers Union (the "Union"), 1 vote for the Intervenor,[2] 16 votes against the participat-

[1] An earlier election was set aside by the Board based on objections filed by the Union (Pet. App. 19a).

[2] The Southern Labor Union, Local No. 325, filed a petition seeking to represent a unit of employees at one of the Com-

ing labor unions, and 9 challenged ballots (A. 6(b)). The Company filed timely objections to the election, contending that (1) the Union gave the impression of surveillance of the voters, made material misrepresentations concerning the federal wage freeze, disseminated false information that the Company had coerced and intimidated its employees; and (2) the ballot's provision for a "neither" vote was misleading (A. 3-5). The Regional Director overruled the objections and certified the Union as the bargaining representative of the employees in the appropriate unit (A. 22). The Company's request for review was denied by the Board (Pet. App. 20a-21a).

The Company refused to bargain with the Union, the Board found the Company's refusal violative of Section 8(a)(5) and (1) of the National Labor Relations Act, and issued a bargaining order (Pet. App. 23a, 26a-27a). The court of appeals enforced the Board's order (Pet. App. 16a).

2. The petition challenges only the Board's finding that a letter sent to the employees by the Union shortly before the election did not constitute grounds for setting aside the election. The letter stated in relevant part:

> Since the last election the company has been sold to U.S. Plywood-Champion Paper, Inc. This [is]

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pany's mines here involved. Thereafter, the Regional Director ordered that union's name to be placed on the ballot herein (A. 22).

"A." references are to the printed appendix to the briefs in the court below.

> one of the largest corporations in the world, and can easily pay the union scale. It is reported that they paid five million dollars to Bill Conley and his associates, including Frank Qualls. Don't be mis-led [sic] by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the United Mine Workers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family. [A. 5a.]

The Company contended before the Board that the statement constituted a material misrepresentation because it incorrectly claimed that the Union could avoid the legal effect of the wage-price freeze (A. 4, 9-10). In support of its position, the Company submitted signed identical statements from eight employees asserting that their votes for the Union were influenced by this alleged misrepresentation since it led them to believe that, if the Union won the election, they would receive the present union contract wages and other benefits immediately (A. 9, 13).

The Regional Director, whose findings the Board adopted, concluded that the letter did not warrant setting aside the election. He pointed out that, even though "the alleged improper statement could be subject to the interpretation that if the employees voted for the Union, they would avoid the legal effect of the wage freeze," "employees are also aware that no wage increases of any kind could be obtained by the Union in negotiation with the employer unless the

employer agreed to such wage increases" (A. 6(h)). He found that the Company campaign letters "clearly indicate that the employer will resist such wage increases" (A. 6(h), 6(k)-(n)). The Regional Director also discounted the eight affidavits, explaining that "the Board has consistently refused to accept post-election statements regarding the intent of voters as a basis for setting aside elections or changing the results of secret ballots" (A. 6(h)).

The court of appeals, citing *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608, agreed that post-election "statements of voter intention [cannot] impeach the validity of secret ballots" (Pet. App. 9a-10a). The court further found that, while:

> the letter is subject to the interpretation that if company employees voted for the union they would immediately obtain union scale wages * * * [it] is equally subject to the interpretation that the union could obtain for employees contract wages as soon as it was legal to do so—as soon as the freeze was ended. The letter is at worst delphic and inartistic. It may have been intended to persuade employees that a temporary wage freeze should not dissuade them from voting for the union. [Pet. App. 13a.]

The court concluded:

> Even if the letter is interpreted as the company would have us do, the Board did not err in concluding that the misrepresentation i[t] conveyed did not have a real impact on the election. Information about the wage freeze was not with-

> in the special knowledge of the union. It had been widely publicized and debated. And, the federal government had established places where answers to specific questions about the freeze could be obtained. Moreover, the Regional Director found, and his finding is not unsupported, that the employees were aware that any increase in wages would have to be agreed upon by the company and that the company had stated several times that it would not agree to an increase. For all these reasons, the findings of the Board have evidentiary support and should not be set aside. [Pet. App. 13a-14a.]

3. The issue presented in the petition (Pet. 4)—whether an election should be set aside where the employees are "subject to deliberately false information pertinent to a material issue which is calculated to influence dishonestly their voting decision" is not raised on this record. For the court below found that the Union's letter could not be so characterized; rather it was "at worst delphic and inartistic" (Pet. App. 13a).

Moreover, even assuming the interpretation placed on the letter by the Company was correct, it does not follow that the letter would have required a setting aside of the election. Under the criteria established in *Hollywood Ceramics Co.*, 140 NLRB 221[*] (A. 6 (h), Pet. App. 11a-14a), campaign misrepresentations taint an election only "where a party has mis-

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[*] As the petition correctly states (Pet. 9-11), the *Hollywood Ceramics* criteria have been approved by all of the courts of appeals.

represented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted" (140 NLRB at 224). Here, both the Board and court below found that the employees were in a position to evaluate the Union's letter.

In these circumstances, only factual issues are presented, which do not warrant review by this Court.[4]

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[4] *Continental Oil Co.*, 58 NLRB 169 (1944), *Seneca Knitting Mills, Inc.*, 59 NLRB 754, 756 (1944), and *Radio Corporation of America*, 102 NLRB 124 (1953) (Pet. 11-15) are inapposite. In each of these cases, prior to an election between the incumbent and insurgent unions, the employees were improperly informed that the Wage Stabilization Board had approved a contract negotiated between the company and the incumbent union. As the court below stated (Pet. App. 14a): "The Board found that this information, to which employees did not have ready access, would have the obvious effect of making employees believe that a vote for the incumbent union would insure the previously negotiated wage increases and that a vote for the insurgent union would nullify the approved contract and perhaps cause employees to lose the approved wage increase altogether."

Cross Baking Co. v. *National Labor Relations Board*, 453 F. 2d 1346 (C.A. 1) is similarly inapposite. As the court below noted (Pet. App. 15a), there the misrepresentation, which concerned wage rates obtained by the union at another plant, "was within the special knowledge of the union."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

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